

STATE OF MAINE
SUPREME JUDICIAL COURT

AMENDMENTS TO THE
MAINE RULES OF EVIDENCE

2009 Me. Rules 1

Effective: January 1, 2009

All of the Justices concurring therein, the following amendments to the Maine Rules of Evidence, are hereby adopted to be effective January 1, 2009.

The specific rules amendments are set forth below. To aid in understanding of the amendments, an Advisory Note appears after the text of each amendment. The Advisory Note states the reason for recommending the amendment, but the Advisory Note is not part of the amendment adopted by the Court.

1. The Maine Rules of Evidence are amended to add Rule 514 to read as follows:

RULE 514. MEDIATION PRIVILEGE

(a) Definitions. As used in this rule:

(1) A “mediating party” is a person who is participating in a mediation proceeding as a party or as a representative of a party, regardless of whether the subject matter of that proceeding is in litigation.

(2) A “mediator” is a neutral person conducting the mediation proceeding in the capacity of mediator.

(3) A “representative of a mediating party” is a lawyer, insurance company representative or other person assisting the party in the dispute that is the

subject matter of mediation proceedings, including the mediation proceedings themselves.

(4) A “confidential communication” is a statement, whether oral or written, between a mediating party or representative of a mediating party and a mediator made outside the presence of others during the course of mediation proceedings and that is not intended to be disclosed to third persons.

(b) Party privilege. A mediating party has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made between the mediating party or a representative of the mediating party and a mediator.

(c) Who may claim the privilege. The privilege may be claimed by the mediating party, the mediating party’s guardian or conservator, the personal representative of a deceased mediating party, or the successor, trustee, or similar representative of a corporation, association or other organization, whether or not in existence. The person who was the mediator at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the mediating party.

(d) Mediator privilege. All memoranda and other work product, including files, reports, interviews, case summaries, and notes, prepared by a mediator shall be confidential and not subject to disclosure in any subsequent judicial or administrative proceeding involving any of the parties to any mediation in which

the materials are generated; nor shall a mediator be compelled to disclose in any subsequent judicial or administrative proceeding any communication made between him or her and any participant in the mediation process in the course of, or relating to the subject matter of, any mediation.

(e) Exceptions. There is no privilege under this rule:

(1) Mediated agreement. For a communication that is in an agreement evidenced by a record signed by all parties to the agreement.

(2) Furtherance of crime or fraud. If the services of the mediator were sought or obtained to enable or aid anyone to commit or plan to commit what the mediating party knew or reasonably should have known to be a crime or fraud, or to conceal an ongoing crime or ongoing criminal activity.

(3) Plan to inflict harm. For threats or statements of an intention to inflict bodily injury or commit a crime.

(4) Mediator misconduct. For communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator.

(5) Party or counsel misconduct. For communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation.

(6) *Welfare of child or elder.* For communications sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party.

(7) *Manifest injustice.* For communications that a court, administrative agency, or arbitrator finds, after a hearing in camera, that the disclosure of which is necessary in the particular case to prevent a manifest injustice, and that the necessity for disclosure is of a sufficient magnitude to outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings.

Advisory Committee Note

The purpose of this new rule is to provide a privilege for confidential statements between parties or their representatives and mediators during the course of mediation. There is no limitation on the subject matter or the circumstances of the mediation, nor is there a particular level of formality prescribed. The rule also provides a privilege for a mediator to refuse to testify in a matter in which the mediator has performed mediation services. The proposed rule is based on similar rules in other states and on the Uniform Mediation Act, which has not been adopted in Maine. Both the party privilege and the mediator privilege are subject to a number of exceptions.

The privilege only applies to mediation proceedings conducted by a neutral mediator. Thus, when a party's lawyer, a guardian *ad litem*, or other person with a particular point of view to represent attempts to function as "mediator" in settlement or other discussions, the privilege is not applicable. The privilege also does not apply to conferences with "settlement judges" or other judicial officials who may be acting in a mediative capacity because of the importance of transparency of public justice institutions.

Subsection (4), which defines "confidential communication," is meant to bring those communications made in private or "caucus" sessions with the

mediator under the coverage of the party's privilege but to keep communications made with all parties present outside of it. This makes the privilege for the mediating party established by this Rule narrower than that proposed by the UMA which covers all communications made as part of a mediation proceeding. The Advisory Committee rejected the broader coverage as artificial and inconsistent with the fundamental concept of a truly confidential communication between a single interest and a trusted confidant as is protected in the other privileges incorporated in the Rules of Evidence.

The definition of "representative of a party" is broad and includes all persons (such as spouses, relatives, friends, insurance adjusters or representatives) as well as lawyers who are present at the mediation session and assisting the party in the mediation.

Many states have made explicit exemptions to the privilege for information relating to administrative aspects of the mediation. This includes, for example, whether the mediation has occurred or has terminated, whether a settlement was reached, and attendance by the parties. Section 7(b) of the UMA accomplishes this objective. Such information is not privileged under this rule because it does not qualify as a "confidential communication" as defined by this section.

The individual mediator and the mediation profession have an interest in maintaining their neutrality that transcends any particular dispute. Section (c) therefore establishes broader protection for the mediator than is given to the parties under section (b). The first clause of this section makes the records of the mediator confidential and not subject to disclosure in subsequent proceedings that involve the mediating parties. The second clause gives the mediator a privilege from disclosing any communication made between him or her and any participant in the mediation. The use of the phrase "any communication," as opposed to "confidential communication" (as used in section (b) and defined in section (a)(4)) is intentional. The mediator's privilege includes not only those communications made in private caucus but also those made with others present and all other communications.

Subsection (1) of the exceptions is based on the UMA § 6(a)(1) and permits evidence of a signed agreement to be introduced in subsequent proceedings. This includes agreements to mediate, agreements as to how the mediation will be conducted as well as agreements that memorialize the parties' resolution of the conflict. Consistent with the practice of most states, this exception does not include oral agreements made between the parties.

An exception for communications made during a mediation designed to further a crime or fraud, as established by subsection (2), is probably the most common single exception amongst the states that have adopted such privileges. The lawyer-client privilege established by these Rules also contains such an exception (Rule 502(d)(1)). The language of this exception draws on that used in Rule 502 as well as UMA § 6(a)(4), which extends the exemption to cover cases where the mediation is used to conceal an ongoing crime. This exemption does not apply to admissions of past crimes, which remains privileged.

Subsection (3) is based on UMA § 6(a)(3) and similar provisions have been adopted in many states.

Subsection (4) creates an exemption for cases in which professional misconduct by the mediator is alleged. Such a provision is increasingly common amongst states and is also present in UMA § 6(a)(5). As the UMA commentary notes, such disclosures may be necessary to promote mediator accountability by allowing grievances to be brought, and fairness requires that the mediator be able to defend himself or herself against such a claim.

Subsection (5) is adapted from the UMA § 6(a)(6). However, in the UMA, this exception does not apply to the mediator section 6(a)(c). The UMA justifies retaining the mediator's privilege in such cases to maintain the integrity of the mediation process and impartiality of the mediator, which would be threatened if the mediator was frequently called into misconduct cases to be the tie-breaking witness. The exemption created in this Rule applies to parties and mediators alike both due to skepticism about the frequency in which such cases occur and the compelling need for evidence when such cases do arise.

Subsection (6) makes an exception to the privilege child and elder abuse and neglect. Such provisions are common in the domestic mediation confidentiality statutes of many states. Consistent with UMA § 6(a)(7), which serves as the basis for this provision, this exception only applies to proceedings to which a "child or adult protective services agency" is party. In private actions, such as divorce, the exception does not apply. For instance, if in a divorce mediation between Spouse 1 and Spouse 2, one of the Spouses confidentially admits to sexually abusing a child, that admission would be admissible in an action brought by a public agency to protect the child and the mediator could be required to testify about it, but would be privileged in the divorce hearings. As the commentary in the UMA explains,

this distinction is justified because in the private proceeding there is a less compelling need for the evidence and the interest in promoting candor is greater.

Subsection (7) is designed to allow for other, non-listed exceptions to the privilege on an ad hoc basis when justice so requires. A number of states, such as Ohio and Wisconsin, have adopted such provisions. UMA § 6(b) establishes an exception in certain cases, such as for the implementation of a mediated agreement, but only after it is determined, after an in camera hearing, that “the evidence is not otherwise available” and the need for the evidence “substantially outweighs” the interest in protecting confidentiality.

Several states and the UMA § 5 provide for the privilege to be waived when the parties agree to do so. Since Rule 510 already makes provisions for the waiver of privileges established in these Rules, it is unnecessary to have an explicit exemption in this Rule that allows for the privileges established in subsections (b) and (d) to be waived.

2. This amendment is effective January 1, 2009.

Dated: October 22, 2008

/s/

LEIGH I. SAUFLEY
Chief Justice

/s/

ROBERT W. CLIFFORD
Associate Justice

/s/

DONALD G. ALEXANDER
Associate Justice

/s/

JON D. LEVY
Associate Justice

/s/

WARREN M. SILVER
Associate Justice

/s/

ANDREW M. MEAD
Associate Justice

/s/

ELLEN A. GORMAN
Associate Justice